

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PACIFIC BELLS, LLC; BRUNSWIKST.,
LLC; and WOW DISTRIBUTING, INC., on
their own behalf and on behalf of similarly
situated employers,

and

MELISSA JOHNSTON; LENA MADDEN;
JUDI CHAPMAN; KATHERINE SOLAN;
JOHN EDMUNDSON; and MIKE LINDBO,
individuals on their own behalf and on behalf
of similarly situated employees,

Class Plaintiffs,

v.

JAY INSLEE, in his capacity as Governor of
the State of Washington; CAMI FEEK, in her
capacity as the Commissioner and Chief
Executive Officer of the Washington
Employment Security Department; DONALD
CLINTSMAN, in his capacity as the Acting
Secretary of the Washington Department of
Social and Health Services; and THE LONG-
TERM SERVICES AND SUPPORTS TRUST
FUND, an employee benefit plan,

Defendants.

No. 2:21-cv-01515-TSZ

**JOINT STATUS REPORT AND
DISCOVERY PLAN**

The parties, by and through their attorneys of record, pursuant to Local Civil Rule for the
Western District of Washington ("LCR") 16, Federal Rule of Civil Procedure ("FRCP") 26(f), and
LCR 26(f), hereby submit the following Joint Status Report and Discovery Plan:

1. Statement of the nature and complexity of the case

Class Plaintiffs' statement: Plaintiffs Pacific Bells, LLC, BrunswikSt., LLC, and WOW Distribution, Inc., on their own behalf and on behalf of similarly situated employers and Melissa Johnston, Lena Madden, Judi Chapman, Katherine Solan, John Edmundson, and Mike Lindbo, on their own behalf and on behalf of similarly situated employees (collectively "Plaintiffs" or the "Putative Class") request declaratory relief from this Court that (1) the Long-Term Services and Support Trust Program, referred to as "WA Cares" or the "Act" and codified at RCW 50B.04, *et seq.*, is preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"); (2) WA Cares and its Trust constitute a MEWA as defined by ERISA, subject to both ERISA and state insurance law; (3) as a MEWA, the forfeiture provisions of WA Cares are impermissible and violate ERISA, state insurance law and the requirements of I.R.C. § 7702B, which have been adopted by WA Cares; (4) employers are not required to withhold and remit a premium equal to .58% (0.0058) of wages paid to individuals in "employment" with an "employer," as defined by RCW 50B.04.010, to the Employment Security Department of the State of Washington ("ESD") or report any related information thereto; (5) WA Cares violates the Equal Protection Clause of the Fourteenth Amendment and the Privileges and Immunities Clause of the U.S. Constitution; (6) WA Cares Act violates the Age Discrimination in Employment Act of 1967 ("ADEA") and the Older Workers Benefit Protection Act; (7) all provisions of RCW 50B.04, *et seq.*, are void and unenforceable because the offending provisions are not severable; and (8) the enforcement of employee benefit plan provisions that violate ERISA or other federal and state statutes constitutes a breach of Defendants' fiduciary duty under ERISA and at common law. Plaintiffs also request return of their own contributions that were deposited in the Trust to provide long-term care insurance on their behalf, plus earnings, increased by any ancillary expenses.

Defendants' statement: Defendants deny Plaintiffs' allegations and assert that WA Cares is a lawful exercise of Washington State's legislative power. Defendants further assert that this Court lacks subject matter jurisdiction under the Tax Injunction Act, 28 U.S.C. § 1341, and Article III of the United States Constitution. Plaintiffs' claims made against the State of Washington, including their claims for restitution and claims against the Long-Term Services and Supports Trust (to the extent such an entity exists) are also barred by the Eleventh Amendment. Governor Inslee has directed the Employment Security Department to refrain from collecting premiums to fund the program until at least April 2022 and Washington State legislative leadership have indicated their intent to postpone implementation of the program until 2023 and to make substantive changes to the program that will impact, and potentially nullify, Plaintiffs' claims. Accordingly, Plaintiffs' claims are not ripe for adjudication.

2. Proposed deadline for joining additional parties

The parties propose a deadline of March 10, 2022, for joining additional parties

3. Magistrate Judge

No.

4. Discovery Plan

A. Initial Disclosures

The parties served Initial Disclosures on or before January 10, 2022.

B. Subjects, timing and potential phasing of discovery

The parties anticipate taking discovery of each other's claims and defenses including, but not limited to, the WA Cares premium rate, eligibility for WA Cares benefits, projected Medicaid savings, exemption applications, the Trust's incurred costs, and actuarial projections related to the Trust's solvency, through written discovery. At this time, Plaintiffs do not anticipate conducting depositions or a need for phasing of discovery or alteration of the standard timelines the Court typically sets for completion of discovery. Defendants anticipate taking the depositions of Plaintiffs and conducting written discovery concerning the factual basis of Plaintiffs' claims.

1 The parties do not waive any arguments regarding the scope of discovery or the merits of
2 the parties' claims or defenses.

3 **C. Electronically stored information**

4 Although certain communications and other documents relevant to this case may be
5 stored electronically, at this time the parties do not anticipate any unusual issues regarding
6 disclosure, discovery, or preservation of electronically stored information. The parties will
7 consider executing the Model Agreement Regarding Discovery of Electronically Stored
8 Information.
9

10 **D. Privilege issues**

11 The parties do not believe any privilege issues of unusual significance exist. The parties
12 anticipate dealing with attorney-client privilege and/or work product if and when such issues
13 arise.
14

15 **E. Proposed limitations on discovery**

16 The parties do not believe that any further limitations on discovery are needed in this case
17 apart from the general standards of the Federal Rules of Civil Procedure and the Local Civil
18 Rules for the Western District of Washington. If the parties determine later that discovery
19 limitations should be adjusted, the parties may stipulate to adjusted limitations or seek relief from
20 the Court.
21

22 **F. The need for any discovery related orders**

23 The parties do not see a need for discovery-related orders at this time. The parties agree
24 to meet and confer prior to filing a motion.
25
26
27

5. Items set forth in Local Civil Rule 26(f)(1)

A. Prompt case resolution

In the Rule 26(f) conference, the parties discussed prompt resolution but were unable to resolve their differences. The parties anticipate that this case will be decided by the Court on one or more dispositive motions. Defendants have filed a motion to dismiss based on jurisdictional challenges. Plaintiffs propose, with agreement from the Defendants, to resolve the dispositive motions prior to filing a motion for class certification.

B. Alternative dispute resolution

The parties agree that alternate dispute resolution is not appropriate.

C. Related cases

There is no related case pending before the Court or in another jurisdiction.

D. Discovery management

The parties agree to consult with each other regarding discovery issues, if any.

E. Anticipated discovery sought

See 4(B).

F. Phasing motions

The parties agree that a formal order requiring motions to be phased need not be entered.

G. Preservation of discoverable information

The parties have been advised of the need to preserve discoverable information, including electronically stored information, consistent with their obligations under the Federal Rules of Civil Procedure. The parties do not anticipate that preservation issues will arise.

H. Privilege Issues

The parties anticipate dealing with attorney-client privilege and/or work product if and when such issues arise.

I. Model Protocol for Discovery of ESI

The parties do not anticipate that discovery of ESI will pose particular challenges in this case, as the scope of discovery has already been limited by the parties. The parties will work together to address any ESI issues that arise and will consider executing the Model Agreement Regarding Discovery of Electronically Stored Information.

J. Alternatives to Model Protocol

The parties do not anticipate issues with the discovery of electronically stored information. The parties will confer in an attempt to agree to limitations to ensure that the costs associated with any production of ESI and other discovery are shared appropriately. If the parties cannot reach an agreement regarding the format of disclosure or the sharing of costs, they will seek the Court's intervention. At this time, the parties do not foresee the need for Court intervention.

6. Date by which discovery can be completed

The parties anticipate that discovery would be completed approximately 120 days prior to the trial date, pursuant to LR 16(f).

7. Bifurcation

The parties agree that the case should not be bifurcated at this time.

8. Pretrial statements and pretrial order

The parties anticipate filing possible motions for summary judgment. The parties anticipate this matter will be resolved by dispositive motions and do not anticipate the need for trial. They therefore ask that the Court waive the requirement of pretrial statements and a pretrial order.

9. Any other suggestions for shortening or simplifying the case

The parties anticipate that this case will be resolved on one or more dispositive motions and that no trial will be necessary.

10. Date the case will be ready for trial

No trial date has been set for this case. The parties anticipate this matter will be resolved by dispositive motions and do not anticipate the need for trial. Therefore, the parties believe it would be premature to set a trial date at this time.

11. Jury or non-jury

The trial will be non-jury.

12. Number of trial days required

The parties anticipate this matter will be resolved by dispositive motions and do not anticipate the need for trial. Therefore, the parties believe it would be premature to set a trial date or to determine the number of trial days required at this time.

13. Names, addresses, and telephone numbers of all trial counsel*Class Plaintiffs' Counsel:*

Richard J. Birmingham
Christine Hawkins
Wm. Brent Hamilton
Davis Wright Tremaine LLP
920 Fifth Avenue, Suite 3300
Seattle, WA 98104
(206) 622-3150 (Tel)
(206) 757-7700 (Fax)

Counsel for Defendants:

William McGinty
Daniel J. Judge
Jacob Dishion
7141 Cleanwater Drive SW
P.O. Box 40124
Olympia, WA 98504-0124
(360) 586-6565 (Tel)

14. Dates on which trial counsel may have complications to be considered in setting a trial date

Class Plaintiffs' Counsel: Christine Hawkins anticipates being on parental leave from February 15, 2022, through August 1, 2022. Richard Birmingham anticipates being unavailable in July and August of 2022.

1 Defendants' Counsel: William McGinty anticipates being unavailable in August through
2 December of 2022.

3 **15. Service on defendants**

4 All defendants have been served.

5 **16. Scheduling conference**

6 Defendants have one motion pending seeking dismissal of this action for lack of
7 jurisdiction. At the resolution of that motion, if the Court denies it, the parties intend to file
8 motions for summary judgment on an agreed briefing schedule established by the parties. The
9 parties agree that class certification will be resolved after the dispositive motions and will file a
10 stipulated motion to extend Plaintiffs' deadline to move for a determination under
11 F.R.C.P. 23(c)(1) as to whether the case is to be maintained as a class action until 90 days after
12 the Court's rulings on the dispositive motions. At this time, the parties do not request a
13 scheduling conference.

14 **17. Dates that Rule 7.1 Disclosure Statements were filed**

15 Plaintiffs filed their Corporate Disclosure Statements on November 16, 2021 (Dkt. # 8, 9
16 and 10).

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

1
2 DATED this 10th day of January, 2022.

3 DAVIS WRIGHT TREMAINE LLP
4 Attorneys for Class Plaintiffs

5 By /s/ Richard J. Birmingham
6 Richard J. Birmingham, WSBA #8685
7 920 Fifth Avenue, Suite 3300
8 Seattle, WA 98104-1610
9 Telephone: 206-622-3150
10 Fax: 206-757-7700
11 E-mail: richbirmingham@dwt.com

12 By /s/ Wm. Brent Hamilton, Jr.
13 Wm. Brent Hamilton, Jr., WSBA#52151
14 1300 SW 5th Avenue, Suite 2400
15 Portland, OR 97201-5610
16 Telephone: 503.778.5472
17 Fax: 503.778.5299
18 E-mail: brenthamilton@dwt.com

19 By /s/ Christine Hawkins
20 Christine Hawkins, WSBA #44972
21 777 108th Avenue NE, Suite 2300
22 Bellevue, WA 98004-5149
23 Telephone: 425-646-6100
24 Fax: 425-646-6199
25 E-mail: christinehawkins@dwt.com

26 OFFICE OF THE ATTORNEY GENERAL
27 Attorneys for Defendants

Via email authorization

By /s/ William J. McGinty
William McGinty
Daniel J. Judge
Jacob Dishion
7141 Cleanwater Drive SW
P.O. Box 40124
Olympia, WA 98504-0124
Telephone: 360-586-6565
E-mail: william.mcginity@atg.wa.gov
E-mail: daniel.judge@atg.wa.gov
E-mail: jabob.dishion@atg.wa.gov

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on January 10, 2022, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system. All other parties (if any) shall be served in accordance with the Federal Rules of Civil Procedure.

DATED this 10th day of January, 2022.



Susan Bright